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No. 80-2187

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MARGARET E. JOHNSON MALMSTEDT and Estate of BERTIL MALMSTEDT, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

On Petition For A Writ Of Certiorari Re:
United States Court Of Appeals For The Fourth Circuit

REPLY TO RESPONDENTS OPPOSITION

SYLMAN I. EUZENT
13 E. Deer Park Drive
Gaithersburg, Maryland 20760
(301) 258-0003
Attorney for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

REPLY TO RESPONDENT'S OPPOSITION

Respondent's Opposition to Petition for Writ of Certiorari totally failed to address the issues Petitioners presented to this Court. Instead he has attempted to summarize the holdings of the lower courts in the instant case and cited cases which he alleges support their holdings. Cases cited by Respondent do not support the holdings of the lower courts. They are cases in which the Commissioner *audited* the tax returns for the years involved and *issued a deficiency notice,* and/or cases which are not analogous to the instant case. Even in summarizing the holdings of the lower courts, Respondent made at least two errors:

1. Respondent contends (page 2 of his Memorandum) that the 4th Circuit Appeals Court reversed "on other issues"; it is clear from the Court's opinion[1] that it reversed on the issue of losses sustained by Petitioners in the years involved.

2. Respondent begs the issues before this Court by his statement (page 2 of his Memorandum) that "petitioners repeated their inability to produce evidence." Petitioners have raised three questions before this Court, two of which deal precisely with the question of proof of income represented by income tax returns, which have not been audited by the Commissioner, particularly returns stipulated into evidence upon motion of the Commissioner.

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[1] See *Malmstedt* v. *Commissioner,* 578 F.2d 520, where the Court said in pertinent part:

> "* * *. It follows that there must be a recomputation of the taxpayer's tax liability, if any, after giving effect to the changes required under our ruling on the deductibility of interest and tax payments and the treatment of the unamortized portion of the refinancing fee. The allocation of such deduction among the tax years involved and right of carry-forward of any such deductions are matters that can only be resolved on remand."

The 4th Circuit Appeals Court found that Petitioners sustained expenses of interest, taxes and unamortized refinancing fees amounting to $339,279.73. It was assisted by a memorandum of Gold Mine expenses showing the type of expense and the year incurred. The same memorandum was also before the Tax Court, who gave it only selected recognition.

The real issue in this case is whether any further proof is required to support unchallenged tax returns which were stipulated into evidence upon motion of the Commissioner. Cases cited by Respondent (page 3 of his Memorandum) clearly demonstrate that the burden to prove tax returns shifts to the taxpayer only:

> " * * * when the Commissioner, after an examination officially and in the manner described by statute determines that they were incorrect and so notified the taxpayer. * * * *Appeal of Pennant Cafeteria,* 5 BTA 293.

The net operating loss carryover issue was known to Respondent[2]. He had many opportunities to examine the returns and issue deficiency notices, but failed to do so. Now, he proposes to shift the burden by arguing that Petitioners must prove returns not challenged by him.

Respondent's position that the tax returns are unreliable and therefore must be proven by Petitioners was adopted only after the Tax Court, *sui sponte,* so held. This position, however, not only ignores the fact that the returns were stipulated into evidence upon the motion of the Commissioner, but also ignores the holding of the

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[2] On page 18 of his first brief before the Tax Court, Respondent noted his computations reflected a net operating loss to Petitioner Margaret E. Johnson Mamlstedt. The issue was also pleaded in Tax Court by Petitioners and answered by Respondent.

T Tax Court in *Pepsi-Cola Co.*, (1945), 5 T.C. 190, 198, a aff'd on other issues, 155 F.2d 921:

> "* * *. The moving party does not meet his burden by raising a doubt or pointing to a fact that there is no proof to sustain certain elements." *Texas Pipeline Co.*, 32 B.T.A. 125; aff'd on other points.

The Tax Court has held that stipulated tax returns are e evidence of the facts represented by such returns. *Ruth I K. Wild*, 42 T.C. 706, holding at 709:

> "* * *. We interpret the stipulation of facts as establishing facts for purposes of this proceeding the matters stated as facts in the return, among which were the fact that * * *. Any other interpretation would cause us to question the fairness and good faith to counsel for the Respondent. * * *"

S See also *Archie A. Swinks*, 51 T.C. 13, p. 17.

Moreover, if as Repondent contends, errors give rise t to unreliability, Respondent and the Tax Court must also l be found to be unreliable. The Fourth Circuit found the Tax Court's determinations erroneous and the Tax (Court found Respondent in error.

Petitioners strongly urge this court to review this case and rule for the basic right of a taxpayer that a tax return is a taxpayer's claim which must stand as correct until challenged by the Commissioner "after an examination officially and in the manner prescribed by statute."

Respectfully submitted,

SYLMAN I. EUZENT
13 E. Deer Park Drive
Gaithersburg, Maryland 20760
(301) 258-0003

Attorney for Petitioner